NO. 83-2016

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CLEO LUTER,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

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FORM STATEMENT

The requirements of Supreme Court Rule 34.1(a), (b), (d), (e) and (f) and the statement of the case are omitted as permitted by Supreme Court Rule 34.2.

REASONS FOR DENYING THE CERTIORARI

I.

The Iowa Supreme Court's finding that the Federal Constitution did not require disclosure of the identity of an individual who participated in drug buy transactions which were unrelated to charges at trial and which were monitored by undercover agents whose observations thereof provided only the basis for probable cause for issuance of search warrants and not the charge at trial, presents no undecided federal question, is not in conflict with prior decisions of this Court, and was justified on the facts.

Search warrants were applied for on the Petitioner, two vehicles, and defendant's home. The supporting affidavits were the same for each application. The supporting affidavits established that the affiant, D.C.I. Agent J. R. Smith, supervised a confidential informant and a known heroin user (Hereinafter, User) who purchased heroin from Petitioner on several separate occasions both at Petitioner's business and residence. In each instance, the confidential informant was fitted with a body voice transmitter and provided with funds for the purpose of purchasing heroin. With respect to the heroin purchase at the residence, Informant and User met; there was conversation between User and Informant in which the purchase of heroin from Luter was discussed including User's statement that"Cleo sure has good dope . . . ."; User was observed driving to the

Luter residence, exiting the vehicle, going to the rear of the residence, and returning to the vehicle within a short time. User returned to Informant and the affiants monitored the conversation while User gave Informant the heroin. A field test indicated the substance purchased by Informant was heroin. The affidavits contained similar observations made by the affiants in connection with the supervised purchases of heroin which occurred at the defendant's place of business.

In addition to the agents' personal observations, the affidavit established that the Confidential Informant told the agents that he had previously purchased heroin from defendant at defendant's residence. Moreover, the affiants attested to the fact that Informant had previously supplied reliable information which had led to several arrests and convictions. Search warrants

were issued February 23, 1982. The warrants were executed on February 25, 1982. Quantities of heroin and cocaine as well as items of drug paraphernalia were seized from Luter's home and car. Luter was arrested and charged with possession with the intent to deliver controlled substances in violation of Iowa Code § 204.401 (1981).

Luter filed pretrial motions to suppress the seized items and compel disclosure of the identities of Informant and User. The trial court overruled these motions. Luter was convicted of Possession with Intent. The Iowa Supreme Court affirmed the conviction.

The first question Petitioner presents for review concerns disclosure of an informant's identity. This issue is two-pronged, each prong requiring separate considerations. However, each aspect of this issue can be resolved through application of existing decisions by this Court.

A. Disclosure of the Informer's identity was not constitutionally mandated for a fair adjudication of Defendant's fourth amendment attack upon the search warrant.

Iowa recognizes the "Informer's Privilege." That is, as a general rule, the State is privileged to withhold the identity of a person who furnishes information relating to violations of the law.[1] See, e.g., State v. Webb, 309 N.W.2d 404, 410 (Iowa 1981). This Court has held "where the disclosure of an informer's identity . . . is

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[1]Whether or not the User falls within the general scope of the informer privilege is not at issue because it was determined that disclosure of User would lead to the disclosure of Informant.

The Iowa Supreme Court accorded User Informant status for two reasons: First, in fact the user was a part of Agent Smith's apparatus for obtaining a buy and was actually an extension of the informant himself; and second, revelation of the user's identity, if known, would seriously jeopardize the informant's anonymity contrary to the rationale of the informant privilege.

relevant and helpful to the defense of accused, or is essential to a fair determination of a cause, the privilege must give way. Roviaro v. United States, 353 U.S. 53, 60-62, 77 S.Ct. 623, 624, 1 L. Ed. 2d 639, 645 (1957). However, this Court has refused to hold that the Federal Constitution requires a State to abolish the Informer's privilege from its law of evidence, and to disclose the informer's identity in every such preliminary hearing where it appears that the officers made arrest or search in reliance upon facts supplied by an informant they had reason to trust." McCray v. Illinois, 386 U.S. 300, 312, 87 S. Ct. 1056, 18 L. Ed. 2d 62, 71 (1967). See also Colorado v. Nunez, ___ U.S. ___, 104 S. Ct. ___, 79 L. Ed. 2d 338, 341 (1984).

Concededly, the question, whether a reviewing court must ever require a revelation of the identity of an informant

once a substantial preliminary showing of falsity has been made, remains undecided by this Court. Franks v. Delaware, 428 U.S. 154, 170, 98 S. Ct. 2674, 57 L. Ed. 2d 667, 683. The facts of this case, however, cannot provide a vehicle for resolution of that question. Prior to trial, Luter attempted to assault the veracity of the affiants by alleging a "material omission" because no underlying facts concerning User's reliability were set forth. However, the primary basis for the search warrant was not hearsay information but the observations of the agents. Thus, this aspect of Petitioner's first issue is clearly controlled by existing decisions of this Court and provides no opportunity for this Court to address any undecided important question of federal law. Clearly, where the "legality of officers' action does not depend upon the credibility of something told but

upon what they saw and heard," disclosure of an informant is not required. Scher v. United States, 305 U.S. 251, 254, 59 S. Ct. ___, 83 L. Ed. 151, 154 (1938).

B. Disclosure is not constitutionally required in this case as a means for defending against the charge at trial.

Identity of an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the defense. Roviaro v. United States, 353 U.S. at 60-61, 77 S. Ct. at 638, 1 L. Ed. 2d at 645. That determination depends on the "circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id.

Petitioner's characterization of user as a "res gestae" witness is inappropriate. The transaction in which User participated occurred prior to the date of the crime and

formed only the basis for the search warrant. Luter was charged with possession with intent to deliver a controlled substance in violation of Iowa Code § 204.401 (1981) on February 25, 1982. The transaction involving Informant and User was not related to the charges filed against Luter. Indeed, there was no evidence of the User transactions introduced at trial. In Iowa, crimes of Possession are time specific crimes. Cf. State v. Post, 286 N.W.2d 194, 202 (Iowa 1979). Thus, User's observations on a date not in question are not material and, therefore, unnecessary to Luter for use in defending against the charge at trial. The second prong of Petitioner's first issue also presents no undecided federal question of importance, and the Iowa Supreme Court's finding is justified on the facts of this case.

II.

The Iowa Supreme Court's finding that probable cause existed for issuance of the search warrants is not in conflict with prior decisions of this Court and was justified on the facts of this case.

In assessing the existence of probable cause for a search warrant, the issuing magistrate must make a practical, common sense decision whether given the totality of the circumstances set forth in the affidavit before him, "including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, ___ U.S. ___, ___, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 526, 548 (1983). Thus, the rigid two-pronged test under Aguilar and Spinelli upon which

defendant relies, has been abandoned, and the "totality of the circumstances" approach that has traditionally been utilized for probable cause determinations has been substituted in its place. Id. at 548. An informant's "veracity," "reliability," and "basis of knowledge" should be utilized only to the extent that they "may usefully illuminate the common-sense, practical question concerning probable cause." Id. The "duty of a reviewing court is simply to insure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed." Id.

Application of the above-stated principles to the facts set forth supra, demonstrates that the magistrate clearly had a substantial basis for concluding that probable cause existed.

In addition to the facts set forth in Division I, the affidavits also provided the

judge with information that heroin had been purchased at Luter's business and at his residence, from which the judge could infer drug operations at both sites. Affiants further swore that the van was "known to be used by Cleo Luter" and was in front of Players Palace [Luter's business] when the user bought heroin there; and the Lincoln was likewise "known to be used by Cleo Luter" and was beside Luter's residence when the user bought heroin at that place. The judge could reasonably infer that drugs were probably transported between Luter's two places, the Palace and the residence, and that they were transported in one or both of the vehicles.

Luter's appellate attack on the showing of probable cause was also premised upon an alleged failure to set forth facts establishing the reliability of the "User." Under the standards articulated in Spinelli v. United States, 393 U.S. 410, 89 S. Ct.

584, 21 L. Ed. 2d 637 (1969) and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L. Ed. 2d 723 (1964), reliability of an informant is relevant only when probable cause is sought to be established by hearsay information of an unidentified informant. Although the drug purchases, which were monitored, involved statements by the User, it is not these statements which provided the probable cause. Rather, probable cause was premised upon the affiant's observations of the drug transactions at Luter's home and business.

Even assuming that User's statements that "Luter has good dope" etc. are necessary to provide sufficient probable cause, no further showing of reliability is needed. As discussed above, rigid adherence to the Aguilar-Spinelli two-pronged test is no longer required for determination of probable cause where hearsay information provides the

basis for the search warrant. Gates, ___ U.S. at ___, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548. Rather, probable cause is evaluated in light of the totality of the circumstances. Id. User's statements were reliable given the circumstances under which they were made.

Under the totality of the circumstances, the affidavits clearly established probable cause to believe evidence of possession of controlled substances could be located on Luter's person, in his home, and in his vehicles.[2]

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[2]Even assuming arguendo that this Court determined that probable cause for the search warrants did not exist, Petitioner would still not be entitled to suppression of the evidence seized. The Court recently held that the exclusionary rule should not be applied so as to bar the use at trial of evidence obtained by officer's acting in reasonable reliance on a search warrant issued by a detatched and neutral magistrate but ultimately found to be invalid. United States v. Leon, ___ U.S. ___ (7/5/84 Sup. Ct. No. 82-177). There can be no question whether the officer's reliance was

Defendant also assails the search warrant on the ground that it was obtained by false information. He alleges that the statement that the confidential informant was reliable was misleading in that the officer had no basis for determining the reliability of the User. To prevail on this claim, defendant is required to show not only that the challenged statements were false, but that the statements were intentionally false or made with reckless disregard for their truth or falsity. See Franks v. Delaware, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667, 682 (1978).

Defendant initially fails to show that any statements were "false" within the contemplation of the Franks rule. A "false" statement is one which leads to a

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2 continued.
reasonable. Indeed, not only did the magistrate determine there was probable but likewise did the Iowa district court and the Iowa Supreme Court.

misconception. Id. "Under proper facts, a failure to disclose information to an issuing judicial officer can constitute misrepresentation . . . 'provided that the omission produces the same practical effect as does an affirmative statement . . .'" Id. Suppression is not justified when factual misrepresentation in the application is immaterial and does not affect the issuance of the warrant. Id. No statement concerning the reliability of the User was made. Luter draws the imaginative inference that the officers intended that no evaluation of the User's reliability be made by the magistrate in order to mislead the magistrate. Such a claim is absurd. It is far more likely that the reliability of the User was not discussed because it was not at issue.[3] Accordingly, any statement

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[3]As the Iowa Supreme Court noted, if the officers were inclined to fabricate, "why would they invent such an involved event for their informations?"

regarding the reliability of the Informant or the User was absolutely immaterial inasmuch as probable cause did not derive from hearsay information as discussed above.

Thus, the Iowa Supreme Court's finding that probable cause existed is not in conflict with prior decisions of this Court.

III.

The Iowa Supreme Court properly applied this Court's standards for reviewing appellate attacks upon the sufficiency of the evidence and determine that the evidence was sufficient to sustain Petitioner's conviction for possession with intent to deliver a controlled substance in violation of Iowa Code § 204.401 (1981).

This Court has clearly set forth the standards governing appellate attacks upon the sufficiency of the evidence to sustain a conviction:

> . . . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, 573 (1978)(Citations omitted).

The crucial factual dispute involved the sufficiency of the evidence to support a finding that Luter intended to deliver. This issue must be determined in light of applicable state law. Id. at 325.

Intent is rarely capable of direct proof and therefore, the factfinder may determine intent by "such reasonable inferences and deductions as may be drawn from the facts proved by the evidence in accordance with common experience and observation." State v. Serr, 322 N.W.2d 96, 101 (Iowa Ct. App. 1982). Intent to deliver may be inferred from the manner in which the substance is packaged; presence of weighing or measuring devices; presence of other paraphernalia commonly utilized in drug dealing. See State v. TeBockhorst, 305 N.W.2d 705, 708 (Iowa 1981); State v. Birkestrand, 239 N.W.2d 353, 363 (Iowa 1976); State v. Boyd, 224 N.W.2d 609, 612-613 (Iowa 1978).

The State presented testimony that pursuant to the execution of search warrants two film cannisters, which had been observed in defendant's car, were recovered from defendant's yard and a neighboring yard after police officers observed defendant throw them as he exited his home. Agent Smith testified that after seizing the film cannisters (Trial Exhibits C and D) he opened them and observed that exhibit C contained a finger cot (used for repackaging heroin/cocaine), "pills" (a folded piece of tin foil with a small amount of heroin), magazine papers, and "sno-seal" (a common heroin packaging device). Agent Smith further testified that Exhibit D also contained finger stalls and foils. Exhibits C and D were admitted into evidence. All of the containers in exhibit D contained heroin. Four of the finger cots in exhibit C contained cocaine, and one of the finger cots contained heroin. The combined weight of the

powders containing heroin was approximately five grams, and the combined weight of the powders containing cocaine was slightly less than five grams.

Defendant places undue significance upon testimony indicating that the quantity of these substances was not necessarily consistent or inconsistent with either possession for personal use or possession for delivery. Any emphasis upon that testimony is misplaced because the inference of intent to deliver under the facts of thiscase derives not from the quantity of the drugs but from the plethora of weighing, measuring, mixing, cutting, and packaging devices which were also seized from defendant's home--many of these devices containing residue of heroin and cocaine.

Officers searched all of the rooms of defendant's house. On a coffee table in the living room, officers discovered a glass

vial, a spoon, a sealed bag that had been opened, a sifter, sno-seals, finger cots, and a gram scale. The plastic bag and the glass bottle were tested by the D.C.I. and determined to have a residue of cocaine. The spoon was also observed to have a residue on it, although it was an insufficient amount to test. Defendant contends these items cannot imply an intent to deliver because they have ordinary household uses. Defendant's argument, however, overlooks the circumstances surrounding these objects: they were all on the coffee table in the living room, an unlikely place for such household objects; and some of the items contained cocaine residue. Such circumstances are clearly inconsistent with the ordinary use of these items.

A search of the first floor utility room yielded a finger cot, strainer, bottle labeled "Pseudo-caine," a single playing

card, a sno-seal, and magazine pages cut into squares. These items are also consistent with preparation of drugs for delivery. Pseudo-caine is a steeping agent used in cutting cocaine; magazine papers are folded to hold cocaine.

In the kitchen area officers discovered a bottle labeled "Dormin" containing capsules, and an empty Dormin bottle was found in the kitchen wastebasket. Dormin is commonly used to extend heroin. Also in the kitchen, officers discovered more finger cots, plastic bags, and a bottle of Quinine Hydrochloride. One of the finger cots was determined to contain heroin residue. Quinine Hydrochloride is a chemical which is used to extend heroin.

Other items such as a mirror, razor blades with cocaine residue, and an additional gram scale were recovered from defendant's home. Testimony indicated that

all of these items have uses consistent wth processing cocaine and heroin for delivery.

In sum, many of the items relied upon by the State have ordinary uses. However, many of these items were found to contain residue of cocaine or heroin, thus negating "ordinary" or non-drug related usage. Furthermore, many of these "ordinary" items were found in close proximity to clearly drug-packaging items such as finger cots and chemical extenders such as Dormin, Psuedo-caine, and Quinine Hydrochloride. The Iowa Supreme Court properly found that a rational jury could have concluded beyond a reasonable doubt that Luter's possession of both heroin and cocaine was with the intent to deliver.

CONCLUSION

The writ of certiorari should be denied and the petition dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certify that on the 12th day of July, 1984, three copies of the foregoing document were deposited in a United States Post Office mailbox, with postage prepaid, and addressed to counsel for the petitioner:

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The undersigned further certify that all parties required to be served have been served.

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